

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991

Junk Fax Protection Act of 2005

Petitions for Declaratory Ruling and  
Retroactive Waiver of 47 C.F.R.  
§ 64.1200(a)(4)(iv) Regarding the Commission's  
Opt-Out Notice Requirement for Faxes Sent with  
The Recipient's Prior Express Permission

CG Docket No. 02-278

CG Docket No. 05-338

**OPPOSITION OF EDUCATIONAL TESTING SERVICE TO THE APPLICATION FOR  
REVIEW OF BAIS YAAKOV OF SPRING VALLEY**

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## SUMMARY

Educational Testing Service (“ETS”), through its counsel and pursuant to 47 C.F.R. 1.115, hereby opposes the Application For Review (the “Application”) filed by Bais Yaakov of Spring Valley (“Bais Yaakov”) on December 1, 2016 requesting that the Federal Communications Commission (the “Commission”) review the November 2, 2016 Order issued by the Chief of the Consumer and Governmental Affairs Bureau (the “Bureau”) granting ETS and 21 other petitioners retroactive waivers of 47 C.F.R. § 64.1200(a)(4)(iv) (“November 2, 2016 Order”).

The November 2, 2016 Order applies to the opt-out notice requirement for solicited faxes sent under the Telephone Consumer Protection Act (“TCPA”). ETS is a defendant in a federal lawsuit in which Bais Yaakov, a serial TCPA litigant, seeks to hold it responsible for potentially millions of dollars of damages (under Bais Yaakov’s theory) as a consequence of faxes sent by a former party in the underlying lawsuit.

The Bureau properly determined that there was “good cause” to grant ETS a retroactive waiver because it was similarly situated to other parties who were confused by a contradictory statement by the Commission regarding the applicability of the opt-out provision to solicited faxes, among other things.

In addition to a timing argument that lacks merit, Bais Yaakov’s other challenges to the Order at issue are not well-taken, including a challenge to the Bureau’s authority to issue retroactive waivers of 47 C.F.R. § 64.1200(a)(4)(iv). First, contrary to Bais Yaakov’s assertion, the Bureau’s order does not have the effect of extinguishing a cause of action under the TCPA, and the Bureau and the Commission have repeatedly stated that they do not and cannot make legal determinations. Second, under 47 C.F.R. § 1.3, the Commission has the authority to waive a regulation that it has issued for “good cause,” and this authority has been repeatedly recognized

by federal appellate courts. Third, the Commission's waiver of a regulation that it issues is not the equivalent of a formal rulemaking, and legal authority addressing an agency's authority to enact a new rule is inapposite as a matter of law.

For the reasons set forth herein, ETS urges that the Commission affirm the decision of the Bureau to issue a retroactive waiver of the opt-out requirement as it applies to solicited faxes under 47 C.F.R. § 64.1200(a)(4)(iv).

## **BACKGROUND**

### **I. Statutory and Regulatory History**

This case concerns the TCPA and Junk Fax Prevention Act, and the Rules and Regulations the Commission has promulgated interpreting and enforcing those Acts. The TCPA, as modified by the Junk Fax Protection Act, prohibits the use of fax machines for sending any “unsolicited advertisement.” It also contains opt-out notice requirements for faxes sent to recipients who had previously provided their express permission to send such faxes.

On October 30, 2014, the Commission issued an order clarifying that the opt-out notice requirement under the TCPA, 47 U.S.C. § 227(b)(1)(C), 2(D), and its implementing regulation, 47 C.F.R. § 64.1200(a)(4)(iv), applies to solicited faxes.<sup>1</sup> The Commission noted that those “who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether [the] requirement for opt-out notices applied to them,” and thus the Commission found “good cause” for waiving the opt-out notice requirement on a case-by-case basis because “(1) special circumstances warrant deviation from the general rule and (2) the

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<sup>1</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278, 05-338, FCC 14-164, Order at ¶ 1 (Oct. 30, 2014) (“October 2014 Order”), *appeal pending*, No. 14-1234 (D.C. Cir.).

waiver would better serve the public interest than would application of the rule.”<sup>2</sup> With regard to the “special circumstances” prong, the Commission identified “two grounds” leading to “confusion” or “misplaced confidence” about the inapplicability of the opt-out notice requirement to solicited faxes.<sup>3</sup> *First*, a prior Commission order “caused confusion or misplaced confidence” by stating that the “opt-out notice requirement only applies to communications that constitute ‘unsolicited advertisements.’”<sup>4</sup> *Second*, the Commission recognized that the notice of its intent to adopt the implementing regulation “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the recipient’s prior express permission.”<sup>5</sup>

Regarding the “public interest” prong, the Commission balanced “legitimate business and consumer interests.”<sup>6</sup> It determined that subjecting businesses to “significant damage awards under the TCPA’s private right of action or possible Commission enforcement” may be “unjust or inequitable” given the confusion and the misplaced confidence about the rule’s inapplicability caused in part by the 2006 Fax Order.<sup>7</sup> On balance, therefore, the Commission concluded that a waiver would better serve the public interest than the rule’s strict application.<sup>8</sup> The Commission

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<sup>2</sup> *Id.* at ¶ 23.

<sup>3</sup> *Id.* at ¶ 24.

<sup>4</sup> *Id.* (quoting *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Junk Fax Prevention Act of 2005, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd. 3787, 3801 n.154 (2006) (“2006 Fax Order”)).

<sup>5</sup> *Id.* ¶ 25

<sup>6</sup> *Id.* ¶ 27.

<sup>7</sup> *Id.* ¶¶ 27-28.

<sup>8</sup> *See id.* ¶¶ 27-29.

also invited “similarly situated parties” to seek retroactive waivers for solicited faxes.<sup>9</sup> The Commission asked that they “make every effort to file within six months of the release of this Order,” *i.e.* by April 30, 2015, and stated that “future waiver requests will be adjudicated on a case-by-case basis.”<sup>10</sup>

Many petitioners have subsequently sought and received retroactive waivers. On August 28, 2015, the Acting Chief of the Consumer and Governmental Affairs Bureau granted waivers to an additional 117 petitioners.<sup>11</sup> Applying the same two-part analysis for “good cause” as in the Commission’s October 2014 Order, the Bureau found “good cause exists to grant individual retroactive waivers of section 64.1200(a)(4)(iv),” because the new petitioners had demonstrated that they were “similarly-situated to the initial waiver recipients.”<sup>12</sup> First, the new petitioners had sent faxes that arguably lacked a fully compliant opt-out notice; second, the petitioners had referenced the 2006 Fax Order’s “confusing, contradictory language” concerning the inapplicability of the opt-out requirement for solicited faxes.<sup>13</sup> Although some of the petitioners had petitioned for waivers in May and June of 2015, after the six-month period (ending on April 30, 2015) referenced in the October 2014 Order, the Bureau granted their petitions, finding that “granting waivers to these parties does not contradict the purpose or intent of the initial waiver order as the parties are similarly situated to the initial waiver recipients.”<sup>14</sup> On December 9,

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<sup>9</sup> *Id.* ¶ 2.

<sup>10</sup> *Id.* ¶ 30 n.102.

<sup>11</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278, 05-338, DA 15-976, Order at ¶¶ 1 n.2, 11 (Aug. 28, 2015) (“August 2015 Order”).

<sup>12</sup> *Id.* ¶¶ 11, 14.

<sup>13</sup> *Id.* ¶¶ 13-16, 19.

<sup>14</sup> *Id.* ¶ 20.

2015, the Bureau granted five more retroactive waivers to petitioners who were similarly situated to the original waiver recipients even though all of those petitions were filed outside of the six-month window referenced in the October 2014 Order.<sup>15</sup>

On November 2, 2016 the Bureau granted waivers to 22 petitioners “that are similarly situated to the waiver recipients previously granted relief by the Commission due to uncertainty about whether the opt-out notice requirement applies to fax advertisements sent with recipient consent.”<sup>16</sup> All of these waiver requests were submitted *after* the six month window established by the Commission and ending on April 30, 2015. Indeed, although ETS’ request was not, many of these requests were made *more than one year after* this date.<sup>17</sup>

## **II. Factual and Procedural History**

One of the petitioners who received a waiver under the November 2, 2016 Order was

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<sup>15</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278, 05-338, DA 15-976, Order at ¶ 1 and ¶ n.1 (Dec. 9, 2015) (“December 2015 Order”).

<sup>16</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278, 05-338, DA 16-1242, Order at ¶ 1 (Nov. 2, 2016) (“November 2, 2016 Order”).

<sup>17</sup> See Petition of Wedgewood Village Pharmacy, Inc. for Retroactive Waiver of 47 CFR § 64.1200(a)(4)(iv) of the Commission’s Rules, CG Docket Nos. 02-278, 05-338 (filed May 24, 2016); Petition of Roche Diagnostics Corporation & Roche Diabetes Care, Inc. for Waiver of 47 Section 64.1200(a)(4)(iv) of the Commission’s Rules, CG Docket Nos. 02-278, 05-338 (filed June 2, 2016); Petition of Amatheon, Inc. for Waiver, CG Docket Nos. 02-278, 05-338 (filed June 3, 2016); Petition of HomeoPet, LLC for Retroactive Waiver of 47 CFR § 64.1200(a)(4)(iv), CG Docket Nos. 02-278, 05-338 (filed June 13, 2016); Petition of Synchrony Bank d/b/a CareCredit & Synchrony Financial for Retroactive Waiver of 47 CFR § 64.1200(a)(4)(iv); Petition of Cochran Wholesale Pharmaceutical, Inc. for Retroactive Waiver, CG Docket Nos. 02-278, 05-338 (filed June 14, 2016, amended July 1, 2016); Petition of North American Bancard, LLC for Waiver of 47 CFR § 64.1200(a)(4)(iv), CG Docket Nos. 02-278, 05-338 (filed Aug. 16, 2016); Petition of Biolase, Inc. for Retroactive Waiver of 47 CFR § 64.12500(a)(4)(iv), CG Dockets 02-278, 05-338 (filed Sept. 9, 2016); Petition for Waiver of Power Products LLC d/b/a Del City Wire Co., Inc., CG Docket Nos. 02-278, 05-338 filed Sept. 9, 2016); Petition of Schwabe North America, Incorporated, et al. for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules, CG Docket Nos. 02-278, 05-338 (filed Sept. 19, 2016).

ETS, a nonprofit organization dedicated to advancing the quality and equity in education for all people. It provides innovative and meaningful measurement solutions that improve teaching and learning, expand educational opportunities, and inform public policy. ETS' products include well-known tests such as the GRE and TOEFL, as well as products like Criterion, an online writing evaluation service and instructor-led writing tool that helps improve students' outcomes in writing.

ETS petitioned for a waiver because Bais Yaakov had added ETS as a defendant to an earlier putative class action lawsuit filed against others, captioned *Bais Yaakov of Spring Valley v. Houghton Mifflin Harcourt Publishers, Inc., et al.*, No. 13-cv-4577 (S.D.N.Y.) (“*Bais Yaakov*”).<sup>18</sup> The lawsuit was originally filed in July 2013 against Houghton Mifflin Harcourt Publishers, Inc., and one of its employees, Laurel Kaczor (collectively, along with a wholly-owned subsidiary that was added as a defendant in 2014,<sup>19</sup> “HMH”). The lawsuit asserted that HMH sent or caused to be sent a single fax on or about November 15, 2012, that allegedly did not contain a properly worded opt-out notice (the “HMH Fax”).<sup>20</sup> The fax HMH sent contained an ETS logo because it concerned “Criterion,” a product ETS developed but for which HMH had exclusive distribution rights in a given area. The lawsuit further alleged that HMH “jointly and severally caused to be sent out over seventeen thousand (17,000) unsolicited and solicited fax advertisements for goods and/or services without proper opt-out notices to persons throughout the United States.”<sup>21</sup> Bais Yaakov, the plaintiff in the lawsuit, is a religious school in New York

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<sup>18</sup> Petition of Educational Testing Service for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv), CG Docket Nos. 02-278 and 05-338, at 2 (Mar. 16, 2016) (“ETS Petition”).

<sup>19</sup> *Bais Yaakov*, No. 13-cv-4577, Am. Cmpl. [Dkt. No. 55] (S.D.N.Y. Nov. 2, 2014).

<sup>20</sup> *See id.* ¶ 11.

<sup>21</sup> *Id.* ¶ 2.

and a customer of HMH.<sup>22</sup>

On January 20, 2015, HMH petitioned the Bureau for a *retroactive waiver for the same facsimile that is the subject of this proceeding*, i.e. the HMH Fax. As noted above, on August 28, 2015, the Bureau granted HMH's petition along with 116 similar petitions filed by several other parties.<sup>23</sup> Based on the docket, Bais Yaakov apparently did not appeal the granting of HMH's waiver petition even though it applies to the *exact same fax*, the HMH Fax, that is at issue in ETS' petition and is the only fax on which the underlying putative class action lawsuit is premised.

On July 15, 2015 the Southern District of New York compelled Bais Yaakov to pursue its claims against HMH in arbitration.<sup>24</sup> Having failed in its efforts to pursue a putative class action against the HMH Defendants, Bais Yaakov added ETS to the case, serving ETS in August 2015, more than two years after the case was originally filed.<sup>25</sup>

As a result of the order compelling arbitration, Bais Yaakov's only remaining claims in the litigation were against ETS, which was added as a party only because of Bais Yaakov's inability to proceed against HMH as a class representative. Bais Yaakov's claims against ETS were then stayed beginning November 13, 2015 pending the Supreme Court's decision in *Campbell-Ewald v. Gomez* 136 S. Ct. 663 (Jan. 20, 2016), which had the potential to immediately resolve a dispositive issue in the case. The Supreme Court issued its ruling earlier

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<sup>22</sup> See *id.* ¶ 6; Petition of Houghton Mifflin Harcourt Publishers, Inc., et al., for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv), CG Docket Nos. 02-278 and 05-338, at 3 (Jan. 20, 2015) ("HMH Petition").

<sup>23</sup> August 2015 Order at ¶¶ 1, 24.

<sup>24</sup> See *Bais Yaakov*, No. 13-cv-4577, Order [Dkt. No. 78] (S.D.N.Y. July 15, 2015) and HMH Defs. Mot. to Compel Arbitration [Dkt. Nos. 56-57] (S.D.N.Y. Nov. 3, 2014).

<sup>25</sup> See *Bais Yaakov*, No. 13-cv-4577, 2d Am. Compl. [Dkt. No. 79] (S.D.N.Y. Aug. 5, 2015).

this year in that case and the stay was lifted. On March 16, 2016, ETS filed a petition requesting a waiver for the very same facsimile at issue in this litigation, the HMH Fax. ETS reserved its right to rely on the Bureau’s prior waiver related to the HMH Fax that had already been granted to HMH (and over which Bais Yaakov apparently never sought review), and ETS made this request even though it has two pending motions to dismiss and has not yet filed an Answer to the Second Amended Complaint. On November 2, 2016 the Bureau granted a waiver to ETS among other petitioners, rejecting many of the same arguments Bais Yaakov makes here.<sup>26</sup> Although Bais Yaakov did not appeal the waiver granted to HMH for the HMH Fax, Bais Yaakov is now requesting Commission review of the waiver granted to ETS with respect to that same facsimile.

In Bais Yaakov’s latest iteration of its Complaint—which now asserts the same individual and class claims against ETS that Bais Yaakov previously lodged against HMH—Bais Yaakov seeks to represent several putative classes to whom ETS allegedly “sent or caused to be sent” faxes that allegedly did not contain a fully compliant opt-out notice, whether the fax was solicited or unsolicited.<sup>27</sup> ETS denies that it is liable under either the TCPA or New York law because, among other defenses, ETS understands that the HMH Fax was solicited by Bais Yaakov and other putative class members.<sup>28</sup>

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<sup>26</sup> November 2, 2016 Order at ¶ 1, 11.

<sup>27</sup> See *Bais Yaakov*, No. 13-cv-4577, 2d Am. Compl. [Dkt. No. 79] at ¶¶ 18-20, 22, 37.

<sup>28</sup> See HMH Petition at 4; *Bais Yaakov*, No. 13-cv-4577, Ans. Of Houghton Mifflin Harcourt Defs. To First Am. Compl. at 11 (Sixth Defense) [Dkt. No. 62] (S.D.N.Y. Nov. 20, 2014) (“HMH Answer”).

## ARGUMENT

### I. THE NOVEMBER 2, 2016 ORDER PROPERLY FOUND THAT GOOD CAUSE EXISTS TO GRANT ETS A RETROACTIVE WAIVER BECAUSE ETS IS SIMILARLY SITUATED TO PREVIOUS RECIPIENTS OF WAIVERS.

Bais Yaakov's request for Commission review of the waiver should be denied because it has not established an adequate basis for this review. An applicant is required to specify which of the following factors warrant the Commission's review: (i) the action was taken pursuant to delegated authority that is in conflict with statute, regulation, case precedent, or established Commission policy; (ii) the action involves a question of law or policy that the Commission has not previously resolved; (iii) the action involves application of a precedent or policy which should be overturned or revised; (iv) there was a prior erroneous finding as to an important or material question of fact; or (v) prejudicial procedural error was committed.<sup>29</sup> Bais Yaakov's Application does not specify which—if any—of these factors supposedly warrant review.<sup>30</sup> The Commission's rules "do not allow for a 'kitchen sink' approach to an application for review": the burden is "on the Applicant to set forth fully its argument and all underlying relevant facts in the application for review."<sup>31</sup> Furthermore, as explained in more detail below, none of these factors justifies review in any event.

The Bureau is authorized under the October 2014 Order to issue retroactive waivers of 47 C.F.R. § 64.1200(a)(4)(iv). Indeed, the Commission may authorize waiver of any provision of its rules "if good cause therefore is shown."<sup>32</sup> A waiver may be granted if "(1) special circumstances warrant deviation from the general rule and (2) the waiver would better serve the

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<sup>29</sup> 47 C.F.R. § 1.115(b)(2).

<sup>30</sup> See generally Application.

<sup>31</sup> *Application of Red Hot Radio, Inc.*, 19 FCC Recd. 6737, 6745 n.63 (2004).

<sup>32</sup> 47 C.F.R. § 1.3.

public interest than would application of the rule.”<sup>33</sup> The same considerations that repeatedly led the Commission and the Bureau to find that good cause warranted granting the previous petitions for retroactive waiver apply equally here.

*First*, the same “special circumstances” that warranted granting previous waiver requests also demonstrate that ETS is entitled to a waiver. Those “special circumstances” include: (1) the “confusion” or “misplaced confidence” about the inapplicability of the opt-out notice requirement to solicited faxes that was caused by the footnote in the 2006 Fax Order,<sup>34</sup> and (2) the Commission’s adoption of its implementing regulations without making “explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.”<sup>35</sup> That is exactly what the Bureau determined in the November 2, 2016 Order.<sup>36</sup>

*Second*, the “public interest” will also be promoted by the waiver granted to ETS, just as with the other waivers that have been granted. The Commission has already determined that subjecting businesses to “significant damage awards under the TCPA’s private right of action” would be “unjust or inequitable” given the confusion and misplaced confidence about the opt-out requirement’s inapplicability to solicited faxes.<sup>37</sup> As discussed above, ETS has been sued on behalf of a putative class of persons or entities who were allegedly sent unsolicited *and solicited* fax advertisements. The lawsuit against ETS seeks minimum statutory damages of \$500 (with trebling sought up to \$1,500) for each solicited fax that allegedly did not contain a proper opt-out

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<sup>33</sup> October 2014 Order ¶¶ 23; November 2, 2016 Order at ¶ 13.

<sup>34</sup> October 2014 Order at ¶ 24.

<sup>35</sup> *Id.* ¶ 25. *See also* August 2015 Order ¶ 14; December 2015 Order ¶ 13.

<sup>36</sup> *See* November 2, 2016 Order ¶ 13.

<sup>37</sup> October 2014 Order at ¶¶ 27, 28; *see also* November 2, 2016 Order at ¶ 12.

notice sent by or on behalf of ETS over a multi-year period since July 2009.<sup>38</sup> This exposure to potentially millions of dollars in damages may be unjust and inequitable based on the Commission's prior findings.<sup>39</sup>

ETS is worthy of the retroactive waiver granted here. Its involvement in sending the fax at issue was tangential at best—ETS did not send the HMH Fax (and indeed ETS was added as a defendant only in 2015). As explained above, ETS understands that the fax that was sent was both solicited and included opt-out information. And a waiver has already been granted to HMH, the party that actually composed the HMH Fax and caused it to be sent—apparently with no appeal by Bais Yaakov.

As the November 2, 2016 Order found, because ETS is similarly situated to the previous petitioners who were granted waivers, there is also good cause to waive section 64.1200(a)(4)(iv) for any solicited faxes sent by or on behalf of ETS.<sup>40</sup> Like many of the recipients of waivers previously granted,<sup>41</sup> ETS is the subject of a putative class action lawsuit claiming violations of

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<sup>38</sup> See *Bais Yaakov*, No. 13-cv-4577, 2d Am. Compl. [Dkt. No. 79] at ¶¶ 18, 22, 37-39, and p. 14.

<sup>39</sup> See October 2014 Order ¶¶ 27-28.

<sup>40</sup> August 2015 Order ¶ 11, 13-17; November 2, 2016 Order at ¶¶ 11, 13.

<sup>41</sup> See, e.g., Petition of Virbac Corporation for Waiver, CG Docket Nos. 02-278, 05-338 at 2 (filed Nov. 9, 2015); Petition of Humana Insurance Company, et al. for Retroactive Waiver of 47 CFR § 64.1200(a)(4)(iv), CG Docket Nos. 02-278, 05-338 at 5-6 (filed Dec. 18, 2015); Petition of Posture Pro, Inc. for Retroactive Waiver of 47 CFR § 64.1200(a)(4)(iv), CG Docket Nos. 02-278, 05-338 at 1 (filed Feb. 23, 2016); Petition of LKN Communications, Inc. d/b/a ACN, Inc. for Waiver of Section 47 CFR 64.1200(a)(4)(iv) of the Commission's Rules, CG Docket Nos. 02-278, 05-338 at 4 (filed Mar. 1, 2016); Petition of Inter-Med, Inc. d/b/a Vista Dental Products for Retroactive Waiver of 47 CFR § 64.1200(a)(4)(iv), CG Docket Nos. 02-278, 05-338 at 2 (filed Mar. 25, 2016); Petition of Legal & General America, Inc. for Waiver of Section 47 CFR 64.1200(a)(4)(iv) of the Commission's Rules, CG Docket Nos. 02-278, 05-338 at 2-3 (filed Mar. 31, 2016); Petition of Buccaneers Limited Partnership for Retroactive Waiver of 47 CFR § 64.1200(a)(4)(iv), CG Docket Nos. 02-278, 05-338 at 5-6 (filed Apr. 28, 2016); Petition of Wedgewood Village Pharmacy, Inc. for Retroactive Waiver of 47 CFR §

the TCPA for solicited faxes that allegedly contained an inadequate opt-out notice.<sup>42</sup> And, like some of those parties, ETS has been targeted by a plaintiff (Bais Yaakov), that is far from an aggrieved individual consumer. Bais Yaakov and its counsel (Bellin & Associates LLC) have brought numerous “gotcha” class action lawsuits over alleged fax advertisements with allegedly technically noncompliant opt-out notices.<sup>43</sup> Further, like the faxes purportedly sent by the previous petitioners,<sup>44</sup> ETS understands that the HMH Fax was sent<sup>45</sup> pursuant to at least some

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(continued...)

64.1200(a)(4)(iv) of the Commission’s Rules, CG Docket Nos. 02-278, 05-338 at 2-3 (filed May 24, 2016); Petition of Roche Diagnostics Corporation & Roche Diabetes Care, Inc. for Waiver of 47 Section 64.1200(a)(4)(iv) of the Commission’s Rules, CG Docket Nos. 02-278, 05-338 at 4-5 (filed June 2, 2016); Petition of Amatheon, Inc. for Waiver, CG Docket Nos. 02-278, 05-338 at 2-3 (filed June 3, 2016); Petition of HomeoPet, LLC for Retroactive Waiver of 47 CFR § 64.1200(a)(4)(iv), CG Docket Nos. 02-278, 05-338 at 4-5 (filed June 13, 2016); Petition of Cochran Wholesale Pharmaceutical, Inc. for Retroactive Waiver, CG Docket Nos. 02-278, 05-338 at 4 (filed June 14, 2016, amended July 1, 2016); North American Bancard, LLC for Waiver of 47 CFR § 64.1200(a)(4)(iv), CG Docket Nos. 02-278, 05-338 at 6-7 (filed Aug. 16, 2016) (NAB Petition); Petition of Biolase, Inc. for Retroactive Waiver of 47 CFR § 64.12500(a)(4)(iv), CG Dockets 02-278, 05-338 at 4-5 (filed Sept. 9, 2016) (Biolase Petition); Petition for Waiver of Power Products LLC d/b/a Del City Wire Co., Inc., CG Docket Nos. 02-278, 05-338 at 2-3 (filed Sept. 9, 2016); Petition of Schwabe North America, Incorporated, et al. for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules, CG Docket Nos. 02-278, 05-338 at 2 (filed Sept. 19, 2016).

<sup>42</sup> See *Bais Yaakov*, No. 13-cv-4577, 2d Am. Compl. [Dkt. No. 79] at ¶¶ 18, 37.

<sup>43</sup> See, e.g., *Bais Yaakov of Spring Valley v. American Chemicals & Equipment Inc.*, No. 16-CV-00978 (N.D. Ala. June 15, 2016); *Bais Yaakov of Spring Valley v. Varitronics, LLC.*, No. 14-CV-05008 (D. Minn. Dec. 18, 2014); *Bais Yaakov of Spring Valley v. Graduation Source, LLC*, No. 7:14-CV-03232 (S.D.N.Y. May 5, 2014); *Bais Yaakov of Spring Valley v. Varitronics, LLC*, No. 7:14-CV-03083 (S.D.N.Y. May 1, 2014); *Bais Yaakov of Spring Valley v. Alloy, Inc.*, No. 7:12-cv-00581 (S.D.N.Y. Dec. 6, 2013); *Bais Yaakov of Spring Valley v. Richmond, The Am. Int’l Univ. in London, Inc.*, No. 7:13-cv-04564 (S.D.N.Y. July 1, 2013); *Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 4:12-cv-40088 (D. Mass. July 30, 2012), *on appeal*, Nos. 14-01789 & 14-08005 (1st Cir.); *Bais Yaakov of Spring Valley v. Tek Indus., Inc.*, No. 8:11-cv-218 (D. Neb. June 16, 2011); *Bais Yaakov of Spring Valley v. Peterson’s Nelnet, LLC*, No. 11-CV-00011 (D.N.J. Jan. 3, 2011), *on appeal*, No. 13-08025 (3d Cir.); *Bais Yaakov of Spring Valley v. American Chemicals & Equipment Inc.*, No. 16-CV-00978 (N.D. Ala. June 15, 2016).

<sup>44</sup> See *supra* note 46.

recipients' prior express invitation or permission.<sup>46</sup> Moreover, the HMH Fax at the heart of Plaintiff Bais Yaakov's claims against ETS is the *very same facsimile* that was sent by prior petitioner HMH, who received a waiver from the Bureau on August 28, 2015—a waiver that Bais Yaakov never opposed or appealed.

## **II. BAIS YAAKOV'S ARGUMENTS ARE REPETITIOUS OF ARGUMENTS THAT HAVE BEEN PREVIOUSLY REJECTED BY THE BUREAU AND THE COMMISSION**

As explained below, the bulk of Bais Yaakov's arguments in its Application are not new. The Commission and the Bureau have already considered and rejected very similar arguments Bais Yaakov and its counsel have previously advanced in connection with other waiver petitions.<sup>47</sup> The Commission and the Bureau have both rejected Bais Yaakov's argument that a petition filed after April 30, 2015 should be rejected as untimely.<sup>48</sup>

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(continued...)

<sup>45</sup> The factual determination as to whether ETS was a "sender" of the HMH Fax or any other fax advertisement, *see* 47 C.F.R. § 64.1200(f)(10), and whether any such fax advertisement was in fact solicited or unsolicited belongs to the appropriate adjudicator in the federal lawsuit currently pending against ETS. The Bureau may nevertheless grant retroactive waivers for those faxes that are ultimately found to be solicited, provided there is "good cause." *See* August 2015 Order ¶ 17 ("[W]e decline to conduct a factual analysis to determine whether the petitioners actually obtained consent. . . . We reiterate the Commission's statement that the granting of a waiver does not confirm or deny whether the petitioners had the prior express permission of the receipts to send the faxes. That remains a question for triers of fact in the private litigation.").

<sup>46</sup> *See* HMH Petition at 4; *Bais Yaakov*, No. 13-cv-4577, HMH Answer [Dkt. No. 62] at 11 (Sixth Defense) (S.D.N.Y. Nov. 20, 2014); *Bais Yaakov*, No. 13-cv-4577, Deposition testimony of David Sussman [Dkt. No. 183 Ex. A ] at 136:4-10 (S.D.N.Y. Nov. 20, 2014).

<sup>47</sup> *See generally* Bais Yaakov Comments on Petition of Houghton Mifflin Harcourt Publishers, Inc., CG Docket Nos. 07-278, 05-338 (Feb. 13, 2015); Bais Yaakov Corrected Comments on ACT, Inc.'s Petition, CG Docket Nos. 02-278, 05-338 (Dec. 15, 2014); Bais Yaakov Comments on Crown Mortgage Co.'s Petition (Apr. 11, 2014); Bellin & Assocs. Comments at 32-34, CG Docket Nos. 02-278, 05-338 (Feb. 14, 2014).

<sup>48</sup> *See* August 2015 Order ¶ 20; October 2014 Order ¶ 30, n. 102.

**1. ETS' Petition Was Timely And, Like Other Meritorious Petitions Submitted After The Commission's April 30, 2015 Deadline, Was Properly Granted.**

Bais Yaakov argues that ETS's petition was untimely because it did not file its request for a waiver until March 16, 2016, after the six-month guideline period in which the Commission asked that similarly situated parties attempt to make their requests.<sup>49</sup> The Commission has previously appropriately declined to reject waiver petitions solely on the basis that they were submitted after its original, tentative six-month window ending on April 30, 2015.<sup>50</sup> While the Commission has expressed its expectation that parties similarly situated to the original waiver recipients would "make every effort to file within six months of the release of this Order," the Commission also indicated "that future waiver requests will be adjudicated on a case-by-case basis" and refused to "prejudge the outcome of future waiver requests."<sup>51</sup>

The Bureau made good on that promise in August 2015 when it granted several petitions for retroactive waiver that were submitted after the April 30, 2015 deadline. The Bureau again reiterated that it would "examine[] . . . each petition filed, independently."<sup>52</sup> It reasoned that "granting [delayed] waivers . . . does not contradict the purpose or intent of the initial waiver order as the parties involved are similarly situated to the initial waiver recipients."<sup>53</sup>

ETS is similarly situated to those petitioners granted waivers in the prior determinations and in the November 2, 2016 Order with respect to faxes sent prior to the April 30, 2015

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<sup>49</sup> Application at 5-6.

<sup>50</sup> E.g., October 2014 Order ¶ 30, n.102; *see also* August 2015 Order ¶ 20; December 2015 Order ¶ 18.

<sup>51</sup> October 2014 Order ¶ 30 n. 102.

<sup>52</sup> August 2015 Order ¶ 20.

<sup>53</sup> *Id.*

deadline. Furthermore, contrary to Bais Yaakov's unsubstantiated assertions,<sup>54</sup> ETS acted diligently and filed its Petition within a reasonable time. ***Bais Yaakov did not even serve ETS with the putative class action lawsuit until August 2015, well after the April 30, 2015 deadline.***<sup>55</sup> Like other petitioners, ETS needed time to hire outside counsel and conduct its initial investigation into the facts alleged in the Complaint and was not aware of the need to seek a retroactive waiver until it had done so.<sup>56</sup>

Bais Yaakov does not cite any decision or authority from any jurisdiction in support of its timing argument. Moreover, Bais Yaakov's argument fails to account for the fact that neither the Commission's plain language in the October 2014 Order nor the Bureau's November 2, 2016 Order contained any specified "deadline"; to the contrary, it was anticipated that applications would be made—and evaluated on a case-by-case basis—after April 30, 2015.<sup>57</sup> And as discussed in more detail above, the Bureau followed this direction by granting multiple waivers to petitions filed well outside the six-month period.

Furthermore, the underlying circumstances of ETS' request for a waiver indicate that it

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<sup>54</sup> Bais Yaakov's argument that ETS likely was aware of the lawsuit at the time it was originally filed in July 2013 because Bais Yaakov sued Houghton Mifflin, a distributor of ETS, is unsubstantiated. (Application at 4-5.) In fact, Bais Yaakov requested discovery on this very issue in opposing ETS's motion to dismiss the lawsuit. *See Bais Yaakov*, No. 13-cv-4577, Corrected Mem. of Law in Opp. to ETS's Mot. to Dismiss [Dkt. No. 121] at 14 (S.D.N.Y. Mar. 1, 2016). Notably, Bais Yaakov never claims to have notified ETS of the lawsuit prior to serving ETS with a summons. As part of the litigation, ETS even offered a sworn declaration from its general counsel that it had no knowledge of the litigation prior to August 2015.

<sup>55</sup> *See Bais Yaakov*, No. 13-cv-4577, 2d Am. Compl. [Dkt. No. 79] (S.D.N.Y. Aug. 5, 2015).

<sup>56</sup> *Cf.* Petition of Costco Wholesale Corporation for Retroactive Waiver, CG Docket Nos. 02-278, 05-338 (July 20, 2015).

<sup>57</sup> October 2014 Order ¶ 30 n.102 (“[W]e note that all future waiver requests will be adjudicated on a case-by-case basis and do not prejudice the outcome of future waiver requests in this Order”); November 2, 2016 Order ¶ 18 & n. 70; December 2015 Order ¶ 18; August 2015 Order ¶ 20 & n. 70.

acted diligently. Notably, Bais Yaakov's Application ignores most of those circumstances even though ETS briefed them extensively in connection with the proceedings before the Bureau.

*First*, Bais Yaakov failed to name ETS as a defendant in the underlying lawsuit until August 5, 2015 (and only after it became clear that it could not pursue a class action against HMH)—more than three months *after* the six-month guideline period expired. Indeed, ETS had no knowledge of the lawsuit before being named. *Second*, shortly after Bais Yaakov decided to add ETS as a defendant ***the lawsuit was stayed in full*** pending the outcome of the Supreme Court's decision in *Campbell-Ewald v. Gomez*, 136 S. Ct. 663 (Jan. 20, 2016).<sup>58</sup> The *Campbell-Ewald* decision had the potential to immediately resolve a dispositive issue in this litigation, which would have made a waiver unnecessary. ***Bais Yaakov's Application never even mentions the stay in the litigation.*** That is remarkable given its professed concerns about the "timing" of events.

Finally, the timing of ETS' request for a waiver is all the more understandable given that when it was named as a defendant HMH—the party that actually sent the fax at issue in this litigation—had a pending waiver application for the *same HMH Fax*, which application was subsequently granted.<sup>59</sup> ETS had no reason to request a waiver for the HMH Fax prior to being named as a defendant in a TCPA lawsuit, and after the stay was lifted in this case it simply made a request to remove any possible doubt that the waiver applied to the HMH Fax for ETS (even though ETS did not send it) given that a retroactive waiver had already been granted to HMH with respect to the HMH Fax, with no appeal by Bais Yaakov.<sup>60</sup> Clearly, ETS was diligent in timely filing its waiver request.

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<sup>58</sup> *Bais Yaakov*, No. 13-cv-4577, Stipulation and Order [Dkt. No. 101] (S.D.N.Y. Nov. 13, 2015).

<sup>59</sup> August 2015 Order ¶¶ 1 n.2, 24.

<sup>60</sup> ETS Petition at 1.

## **2. The November 2, 2016 Order Does Not Extinguish A TCPA Cause Of Action For Violation Of The Opt-Out Regulation**

Bais Yaakov next argues that review of the November 2, 2016 Order is appropriate to the extent that this order waives pre-existing statutory causes of action under the TCPA for violation of the opt-out regulation. That argument is not well-taken because ETS did not ask the Bureau to abrogate any private right of action created by 47 U.S.C. § 227 or any other *statutory* provision. Rather, ETS sought a waiver of the Commission’s regulations (*i.e.*, Section 64.1200(a)(4)(iv)) just as many other petitioners have done successfully. The Commission has the discretion and authority to waive “violations of FCC rules,” as it has repeatedly done in granting prior waivers.<sup>61</sup> There is no “impairment” of the TCPA for a waiver from a regulation that might serve as a predicate for a statutory cause of action any more than the Commission impairs the TCPA when it amends regulations. Nor is the granting of a retroactive waiver of a regulation a repeal of a statute.

It is clear that the Commission may waive its rules “for good cause shown.”<sup>62</sup> “Good cause” exists and “[a] waiver may be granted if: (1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.”<sup>63</sup> The discretion to grant retroactive waivers acts as an important “safety valve” to the regulatory system for scenarios where the public interest would not be served by strict application of a rule.<sup>64</sup> Courts “afford ‘substantial judicial deference’ to the FCC’s

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<sup>61</sup> See *Hill v. FCC*, 496 F. Appx. 396, 398 (5th Cir. 2012); *Nat’l Ass’n of Broad. v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009).

<sup>62</sup> 47 C.F.R. § 1.3.

<sup>63</sup> October 2014 Order ¶ 23.

<sup>64</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

judgments on the public interest.”<sup>65</sup> They also “afford the FCC deference in interpreting its own regulations.”<sup>66</sup>

The cases Bais Yaakov cites do not suggest a different result. For example, it quotes *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638 (1990) as saying that “an agency may not bootstrap itself into an area in which it has no jurisdiction.”<sup>67</sup> As noted above, the Commission clearly has jurisdiction to interpret the TCPA and issue accompanying regulations, and the authority to issue waivers of those regulations is subsumed within that jurisdiction.<sup>68</sup> Bais Yaakov's citation to *Natural Resource Defense Counsel v. EPA* is similarly inapposite. There, the Court held that by creating an affirmative defense to private civil suits that was not provided for in the Clean Air Act, the EPA had exceeded its statutory mandate.<sup>69</sup> Here, however, the case-by-case determination whether to grant a waiver is exactly within the Commission's statutory mandate to interpret and enforce its regulations.<sup>70</sup>

### **3. The November 2, 2016 Order Does Not Violate Separation Of Powers**

Bais Yaakov's argument that the November 2, 2016 Order violates separation of powers principles fares no better. The Bureau has neither impinged on the authority of Congress nor overstepped into the province of the judiciary. The Bureau's waiver of Section 64.1200(a)(4)(iv) is not inconsistent with the TCPA's statutory text, which is silent on the waiver issue. The issuance of waivers also has nothing to do with curtailing the private right of action the TCPA

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<sup>65</sup> *MetroPCS California, LLC v. FCC*, 644 F.3d 410, 412-13 (D.C. Cir. 2011).

<sup>66</sup> *Id.* at 412.

<sup>67</sup> Application at 8.

<sup>68</sup> *Hill*, 496 F. App'x at 398; *Nat'l Ass'n of Broad.*, 569 F.3d at 426.

<sup>69</sup> 749 F.3d 1055, 1062-64 (D.C. Cir. 2014).

<sup>70</sup> *Hill*, 496 F. App'x at 398; *Nat'l Ass'n of Broad.*, 569 F.3d at 426.

creates. As the Commission has already recognized in responding to similar arguments, “the mere fact that the TCPA allows for private rights of action based on violations of [the Commission’s] rules implementing the statute in certain circumstances does not undercut [the Commission’s] authority, as the expert agency, to define the scope of when and how [its] rules apply.”<sup>71</sup> In enacting the TCPA, Congress explicitly delegated to the Commission the authority to issue regulations necessary for its implementation.<sup>72</sup> Given that Congress has directly given the Commission the authority to *issue* regulations implementing the TCPA—including 47 C.F.R. § 64.1200(a)(4)(iv)—the Commission would obviously have the authority to waive, for a limited period of time (here, in terms of the date of a fax was sent before the clarification), the application of a regulation that is has issued.<sup>73</sup> Indeed, the Commission has the authority to suspend the application of its own rules at any time.<sup>74</sup> Federal appellate courts have consistently acknowledged the Commission’s authority to waive its own regulations.<sup>75</sup> Of course, courts have also recognized that the Commission’s interpretation of the TCPA is entitled to substantial

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<sup>71</sup> October 2014 Order ¶ 21.

<sup>72</sup> 47 U.S.C. § 227(b)(2) (“The Commission shall prescribe regulations to implement the requirements of this subsection”).

<sup>73</sup> Bais Yaakov erroneously suggests that the determination that it is in the public interest to issue waivers for a limited time and on a case-by-case basis is akin to an agency’s attempt to repeal a statute enacted by Congress. (Application at 9 (citing 1 U.S.C. § 109 (prohibiting the “repeal of any statute” which would have the effect of “extinguish[ing] any penalty, forfeiture, or liability incurred)). As explained elsewhere, the Commission has not attempted to “repeal” the TCPA.

<sup>74</sup> 47 C.F.R. § 1.3. (“The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission.”).

<sup>75</sup> See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“The FCC has authority to waive its rules if there is ‘good cause’ to do so.”); *New York v. FCC*, 267 F.3d 91, 107 (2d Cir. 2001) (citing *Northeast Cellular*); *Hill v. FCC*, 496 F. App’x 396, 403 (5th Cir. 2012) (same).

deference because it is the expert agency given authority to interpret this statute.<sup>76</sup>

The Commission itself has repeatedly, and unequivocally, affirmed that it does not violate the separation of powers when it selectively issues waivers upon a finding of “good cause.”<sup>77</sup> The Bureau has also emphasized this limitation on its power.<sup>78</sup>

#### **4. The November 2, 2016 Order Does Not Promulgate A Retroactive Rule, And *Bowen and Retail, Wholesale* Are Inapposite**

Contrary to Bais Yaakov’s suggestion, in issuing the November 2, 2016 Order the Bureau did not engage in rulemaking of any kind.<sup>79</sup> It merely applied the same reasoning set forth by the Commission in its October 2014 Order, granting waivers to selected applicants based upon a determination that a regulation *previously* promulgated by the Commission resulted in “uncertainty about whether the opt-out notice requirement applies to fax advertisements sent

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<sup>76</sup> See *Nack v. Walburg*, 715 F.3d 680, 684 (8th Cir. 2013) (Courts are encouraged to “defer to [the Commission]’s interpretation” unless it is contrary to the plain text of the statute); *Gager v. Dell Fin. Servs.*, 727 F.3d 265, 268 (3d Cir. 2013); *Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 466-67 (6th Cir. 2010).

<sup>77</sup> October 2014 Order ¶ 21 (“[W]e reject any implication that...we have ‘violate[d] the separation of powers vis-a-vis the judiciary....the Commission is interpreting a statute, the TCPA, over which Congress provided us authority as the expert agency.’); *id.* at ¶ 31 (observing that the Commission’s order should not be “construed in any way to confirm or deny whether [a party]...had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action”).

<sup>78</sup> August 2015 Order ¶ 17 (“We reiterate the Commission’s statement that the granting of a waiver does not confirm or deny whether the petitioners had the prior express permission of the recipients to send the faxes. That remains a question of fact for triers of fact in the private litigation.”) See also November 2, 2016 Order ¶ 16 (“[W]e decline to conduct a factual analysis to determine whether the petitioners actually obtained consent. We reiterate the Commission’s statement that the granting of a waiver does not confirm or deny that the petitioners had the prior express permission of the recipients to send the faxes. That remains a question for triers of fact in the private litigation.”)

<sup>79</sup> See *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 523 n.12 (D.C. Cir. 1999) (collecting cases stating that waiver is “in the nature of an adjudicatory decision rather than the announcement of a new rule”).

with recipient consent.”<sup>80</sup> The Commission determined that 47 C.F.R. § 64.1200(a)(4)(iv) did not provide proper notice to the public, and led to “confusion or misplaced confidence among affected parties that the opt-out notice did not apply to fax ads sent with recipient consent.”<sup>81</sup>

This is not rulemaking, but rather the clarification of a prior existing regulation upon a finding by the expert agency that the rule was not adequate. Specifically, 47 C.F.R. § 64.1200(a)(4)(iv) did not provide proper notice because: (1) it was inconsistent with a portion of an order published by the Commission on May 3, 2006, which stated that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements”; and (2) in adopting 47 C.F.R. § 64.1200(a)(4)(iv), the Commission “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.”<sup>82</sup>

Because there is no legal authority that prohibits an agency from clarifying the application of a regulation and limiting its temporal effect during a time period where it finds that the public was unsure whether it applied, Bais Yaakov relies upon legal authority addressing when an agency may or may not promulgate a *new* rule with retroactive effect.<sup>83</sup> An agency is typically not permitted to enact a regulation with retroactive effect because of the “unfairness of imposing *new* burdens on persons after the fact.”<sup>84</sup> This is because it is generally improper for

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<sup>80</sup> November 2, 2016 Order ¶ 1.

<sup>81</sup> *Id.* ¶ 13.

<sup>82</sup> October 2014 Order ¶¶ 24, 25.

<sup>83</sup> See *Retail, Wholesale and Dept. Store Union, AFL-CIO v. N.L.R.B.*, 466 F.2d 380, 388 (D.C. Cir. 1972) (“Whether to give retroactive effect to new rules adopted in the course of agency adjudication is a difficult and recurring problem in the field of administrative law”); *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988) (“[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result”).

<sup>84</sup> *Landsgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994) (emphasis added).

an agency to “brand[] as ‘unfair’ conduct stamped ‘fair’ at the time a party acted.”<sup>85</sup> Such a concern is not implicated when an agency clarifies an existing burden: *i.e.* the opt-out requirements promulgated by the Commission *do* apply to fax ads sent with prior express permission of the recipient, a gray area because of a prior conflicting statement by the Commission and inadequate notice of the rule’s scope.

**5. ETS Has Demonstrated “Good Cause” For Receiving The Waiver, And It Was Not Required To Plead Special Circumstances Warranting A Waiver**

Bais Yaakov’s further argument that ETS has not demonstrated “good cause” for a waiver is incorrect for several reasons. *First*, the Commission has previously found that “good cause” exists for waiving the opt-out notice requirement for a solicited fax sent before April 30, 2015 when “(1) special circumstances warrant deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.”<sup>86</sup> When this relevant standard is not satisfied, the Bureau has declined to issue a waiver.<sup>87</sup>

*Second*, there was no requirement that ETS produce concrete evidence or plead “special circumstances” in support of its request for a waiver. The Bureau has expressly stated that a party requesting a waiver need not even plead “confusion”: referencing the “confusing, contradictory language” at issue in the regulation is sufficient to create a “presumption of confusion.”<sup>88</sup>

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<sup>85</sup> See *Retail, Wholesale v. NLRB*, 466 F.2d 380, 389 (D.C. Cir. 1972) (quoting *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.)).

<sup>86</sup> October 2014 Order ¶¶ 22-31.

<sup>87</sup> See, e.g., November 2, 2016 Order ¶ 2 (denying waiver petitions where the petitioners acknowledged that they were ignorant of the opt-out notice requirement).

<sup>88</sup> See August 2015 Order ¶ 19 (“[W]e reject [the] arguments that the Commission made actual, specific claims of confusion a requirement to obtain the waiver.”); *id.* ¶ 15 (“[P]etitioners

*Finally*, ETS is not required to submit individualized proof of the “ruinous liability” Bais Yaakov’s class action threatens to impose on ETS—a non-profit organization that did not even send the HMH Fax—in order establish that the public interest is served by the issuance of a waiver. It is difficult to imagine how it would benefit any member of the public—other than Bais Yaakov and its counsel—if the Commission reconsidered the decision to issue a waiver to ETS. The TCPA was enacted for the purpose of protecting consumers from unwanted faxes, and the public interest is not served by enabling a serial litigant like Bais Yaakov to engage in opportunistic “gotcha” class action litigation, especially when the underlying fax was sent with the permission of the named plaintiff and there is only one facsimile at issue.

### **CONCLUSION**

For the reasons stated above, ETS respectfully requests that the Commission deny Bais Yaakov’s application for review. The Commission should affirm the Bureau’s November 2, 2016 order granting ETS a retroactive waiver of Section 64.1200(a)(4)(iv) of Title 47 of the Code of Federal Regulations for any Solicited Faxes transmitted by ETS (or on its behalf) prior to April 30, 2015.

Dated: December 16, 2016

Respectfully submitted,

/s/ William J. Hine

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(continued...)

referencing the confusion between the footnote and the rule are entitled to a presumption of confusion or misplaced confidence.”).

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I, Andrew S. Kleinfeld, hereby certify that on December 16, 2016, I caused a copy of the foregoing to be served by U.S. first-class mail, postage paid, upon each of the following:

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